United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

75-2146

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Docket No. 75-2146

- x

UNITED STATES OF AMERICA ex rel.
EDWARD H. HARNED, JR.,

Petitioner-Appellant,

-against-

ROBERT J. HENDERSON, Superintendent,
Auburn Correctional Facility,

Respondent-Appellee.

- x

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P/S

Appeal from Orders and Judgment of the
United States District Court for the
Eastern District of New York

APPELLANT'S BRIEF

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APPELLANT'S BRIEF

PRELIMINARY STATEMENT

This is an appeal from a judgment of the United States District Court for the Eastern District of New York, dated October 17, 1975 (Docket No. 73C 1103), dismissing appellant's petition for a writ of habeas corpus. A copy of the judgment is Appendix Exhibit ("App.") B. Copies of the memoranda and orders of the District

Court, Honorable Orrin G. Judd, D.J., dated June 26, 1974 and October 16, 1975, are, respectively, App. C and D.[1]

STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

(1) Is a guilty plea constitutionally void where the accused denies a fundamental element of the crime charged but the Court leads the accused to believe that the denied act is not even relevant to the crime?

(2) Is a guilty plea involuntary, and therefore constitutionally void, if it is the product of unconstitutionally protracted pre-trial incarceration of the accused, psychologically overwhelming pressure upon the accused by his parents and abandonment of the accused by his counsel?

(3) Is an accused criminal denied his constitutional right to a trial if his motion to withdraw a guilty plea is denied although the motion is made immediately after entry of the plea (6-1/2 months

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1 A third memorandum and order by Judge Judd, dated June 23, 1975, (1) denying petitioner's motion for release on bail, and (2) assigning counsel to represent petitioner before the District Court, has not been included in the Appendix.

before sentencing) and there is no showing, or even claim, that the State would be prejudiced in any way if the plea were withdrawn?

STATEMENT OF THE CASE

On or about November 16, 1969, petitioner was arrested by the Nassau County Police Department upon a complaint that he had committed rape and sodomy on the previous day. Upon arraignment, he was released on $2,500 bail. On December 2 a felony examination was conducted in the Nassau County District Court. After hearing testimony by the arresting officer and the complainant, the Court ordered that the accused be held for the Grand Jury. The bail was continued. (A copy of the transcript of the felony examination is App. E.)

On January 27, 1970, the Grand Jury returned indictment # 28586, charging petitioner with rape in the first degree, sodomy in the first degree, sexual abuse in the first degree and assault in the second degree. On April 20, 1970, December 3, 1970 and February 17, 1971, there were conferences between the prosecution and defense counsel with respect to indictment # 28586, but despite petitioner's rejection of plea bargaining and demands for a trial, the case was not set for trial.

Meanwhile, on January 6, 1971, petitioner

was arrested again and charged with rape and burglary. These charges were not in any way connected with the November 1969 charges. His bail was revoked at that time, and he was thereafter continuously incarcerated until December 19, 1975, when he was released on parole. On April 2, 1971, the Grand Jury returned indictment # 31363, charging Harned with rape in the first degree, burglary in the first degree and possession of burglar's tools. He pleaded not guilty to all charges.

There were further conferences between the prosecution and defense counsel on May 18 and June 17, 1971. Harned, now incarcerated, both times rejected plea bargaining and requested trial on the earlier indictment.[2] Nonetheless, on each occasion no trial date was set.

As time passed, various pressures began to wear down Harned's capacity to resist the State's insistent efforts to secure a guilty plea from him. Nineteen months elapsed after his first arrest, five of which he had spent in jail. Nonetheless, there did not seem to be any prospect of a trial on those charges, which he had denied from the first moment the police talked to him (App. E, pp. 5-6). The District Attorney was even threatening to try the later indictment

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2 Of course, Harned was already incarcerated at the time of the conference on February 17, 1971, at which time, too, he had requested trial on the then 13-month old indictment # 28586.

first, which would have, obviously, even further delayed trial on the earlier, insistently denied charges. Moreover, his father was dying and his parents told him that they could not afford to pay any additional legal fees. (They had already paid over $5,000 to the two attorneys representing Harned.) Finally, Harned's counsel threatened not to represent him at trial.

As a direct result of these pressures, on June 23, 1971, appellant "agreed" to plead guilty to the charge of burglary in the first degree in complete satisfaction of all counts of both indictments. This change of plea was accepted that day in the Nassau County Court by Judge Frank X. Altimari. (A copy of the transcript of the June 23, 1971 hearing is App. F.)

Before accepting the change of plea, Judge Altimari made a constitutionally inadequate effort to ascertain whether the guilty plea was voluntary and to determine whether Harned understood the crime to which he was offering to plead guilty. Judge Altimari ignored Harned's statements showing that the change of plea was directly caused by the coercive effect of the State's failure to prosecute the 19-month old charges. (App. F, pp. 6-7, 11-14.) Moreover, Judge Altimari completely failed to establish one of the fundamental elements of burglary in the first degree, i.e., that Harned been armed with

a deadly weapon or had threatened to use a dangerous instrument, or had caused physical injury to any person who was not a participant in the crime. N.Y. Penal Law § 140.30 (McKinney 1975).[3] In response to the Court's questioning, Harned "admitted" only entering a house at night with the intent to commit a rape. (App. F, pp. 14-15.) When

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3 In June 1971 Penal Law § 140.30 provided:

> "A person is guilty of burglary in the first degree when he knowingly enters or remains unlawfully in a dwelling at night with intent to commit a crime therein, and when, in effecting entry or while in the dwelling or in immediate flight therefrom, he or another participant in the crime:
>
> 1. Is armed with explosives or a deadly weapon; or
>
> 2. Causes physical injury to any person who is not a participant in the crime; or
>
> 3. Uses or threatens the immediate use of a danagerous instrument; or
>
> 4. Dislays what appears to be a pistol, revolver or other firearm; except that in any prosecution under this subdivision, it is an affirmative defense that such pistol, revolver or other firearm was not a loaded weapon from which a shot, readily capable of producing death or other serious physical injury, could be discharged. Nothing contained in this subdivision shall constitute a defense to a prosection for, or preclude a conviction of, burglary in the second degree, burglary in the third degree or any other crime.
>
> "Burglary in the first degree is a class B felony."

Judge Altimari asked if there had been an attempt to commit rape, Harned said no (App. F, p. 8). Significantly, the Court advised Harned, misleadingly, that, "the fact that you didn't consummate the rape is of no consequence" (App. F, p. 14).

Thus, despite evidence that the change of plea was involuntary, and without securing any admission of any physical injury or use of a weapon during the burglary (indeed, after incorrectly advising the accused that physical injury was inconsequential), Judge Altimari accepted Harned's plea of guilty to burglary in the first degree.

As soon as he returned to his jail cell, petitioner realized his mistake in yielding to the pressures which had been upon him to change his plea, although he remained ignorant of the statutory definition of the crime he had "admitted." He immediately began writing, and on June 30 sent, a letter to Judge Altimari asking for permission to withdraw his plea of guilty. (A copy of this letter, re-created by Harned from his contemporaneous notes, is App. G.)

On October 29, 1971, Judge Altimari conducted a hearing on Harned's application for leave to withdraw his guilty plea. (A copy of the transcript of this hearing is App. H.) Petitioner's mother testified first and confirmed that she and her husband (who had since

passed away) had strongly urged their son to plead guilty (App. H, pp. 4-9). Harned then testified on his own behalf. He stated that he had not understood the elements involved in burglary at the time of his guilty plea (App. H, p. 12). Indeed, even at this hearing Harned was ignorant of the full meaning of first-degree burglary, defining it, incorrectly, as "remaining unlawfully in a dwelling at night with the intention of committing a crime" (App. H. pp. 13-14). He stated as his grounds for seeking to withdraw his guilty plea (1) that he was not guilty of burglary in the first degree, and (2) that he wished to be tried on the first indictment (App. H, p. 14). Harned stressed the coercive effect of the long delay without trial on the first indictment (App. H, pp. 22-24).

Judge Altimari accurately summarized petitioner's description of the June plea-change proceeding:

> "[H]e resisted taking a plea for a long period of time. He resisted on the day in question. He then had a conversation with his lawyer, he saw his mother crying, his deceased father was upset, he then had a talk with them then he changed his mind and he pled guilty. Hours later when he was alone and outside the influence of his parents and his lawyer, he said, 'I want my trial.'" (App. H, pp. 34-35.)

Judge Altimari gave the State an opportunity to demonstrate that it would be prejudiced by withdrawal of the guilty plea (App. H, pp. 42, 44-45), but it

never made any such claim. Nonetheless, on December 23, 1971, Judge Altimari denied petitioner's motion for leave to withdraw his guilty plea (App. I).

On January 19, 1972, petitioner was sentenced to an indeterminate sentence, not to exceed ten years. The judgment of conviction was affirmed by the Appellate Division, without opinion, on November 27, 1972, People v. Harned, 40 App. Div.2d 952 (2d Dept.), and leave to appeal to the Court of Appeals was denied on January 29, 1973.

On July 23, 1973, Harned filed, pro se, the instant petition for a federal writ of habeas corpus, asserting that (1) he had been denied the right to a speedy trial on the first indictment, and (2) his guilty plea had not been voluntary. On June 26, 1974, without holding a hearing, Judge Judd rejected these two arguments, but concluded that two other possible grounds existed for collateral attack upon the guilty plea: (i) that Harned had been abandoned by his counsel, and (ii) that the record failed to establish facts essential to the charge of burglary in the first degree. However, as neither of these questions had been presented to the state courts, Judge Judd dismissed the petition "for failure to exhaust state remedies, without prejudice to renewal if further

post-conviction proceedings in the courts of New York State are unsuccessful." (App. C, p. 18.)

Harned quickly moved the Nassau County Court to vacate the judgment of conviction. This motion was denied on November 14 (App. J) and leave to appeal to the Appellate Division was denied on January 28, 1975.

On March 5, 1975, Harned renewed his petition for a federal writ. The District Court assigned counsel to represent him. After briefing, but again without a hearing, Judge Judd rejected the two arguments he had previously suggested, holding that there was "no adequate basis for a finding that petitioner was denied effective assistance of counselon his motion to withdrawal his guilty plea" (App. D, p. 11),[4] and that the failure to establish the element of physical injury was "harmless error" (App. D, p. 17).

The District Court issued a certificate of probable cause on November 5, 1975, and notice of appeal was filed two days later.

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4 Harned's complaint, however, had been that his counsel had effectively abandoned him at the time he changed his plea. He had not complained concerning the different counsel who had represented him at the later hearing on his motion.

ARGUMENT

1. Petitioner's plea of guilty to the charge of burglary in the first degree was constitutionally void because he was misled by the trial court as to the elements of that crime, had no independent knowledge of them and, in his testimony at the time of the plea, denied that he had committed any physical injury.

In McCarthy v. United States, 394 U.S. 459 (1969), the Supreme Court considered the conditions under which a federal trial judge may accept a guilty plea:

> "A defendant who enters such a plea simultaneously waives several constitutional rights, including his privilege against compulsory self-incrimination, his right to trial by jury, and his right to confront his accusers. For this waiver to be valid under the Due Process Clause, it must be 'an intentional relinquishment or abandonment of a known right or privilege.' Johnson v. Zerbst, 304 U.S. 458, 464 (1938). Consequently, if a defendant's guilty plea is not equally voluntary and knowing, it has been obtained in violation of due process and is therefore void. Moreover, because a guilty plea is an admission of all the elements of a formal criminal charge, it cannot be truly voluntary unless the defendant possesses an understanding of the law in relation to the facts.
>
> "Thus, in addition to directing the judge to inquire into the defendant's understanding of the nature of the charge and the consequences of his plea, [Fed. Rule Crim. Proc.] 11 also requires the judge to satisfy himself that there is a factual basis for the plea. The judge must determine 'that the conduct which the defendant

> admits constitutes the offense charged in the indictment or information or an offense included therein to which the defendant has pleaded guilty.' Requiring this examination of the relation between the law and the acts the defendant admits having committed is designed to 'protect a defendant who is in the position of pleading voluntarily with an understanding of the nature of the charge but without realizing that his conduct does not actually fall within the charge.'" 394 U.S. at 466-467 (Footnotes omitted.)

As Judge Judd noted (App. D, p. 14), "Subsequent decisions have recognized the applicability of the McCarthy decision to state defendants. Boykin v. Alabama, 395 U.S. 238, 243 n. 5 . . .(1969); North Carolina v. Alford, 400 U.S. 25 . . . (1970)."

In Alford the Supreme Court expanded upon McCarthy. Alford had pleaded guilty to second-degree murder to satisfy an indictment for first-degree murder. Before accepting the plea, the trial court heard the testimony of a police officer and two other witnesses, whose testimony indicated a high likelihood of Alford's guilt as charged. Alford testified that he had not committed the murder, but was pleading guilty to avoid the possibility of the death penalty. 400 U.S. at 28. The Court stated that, "The standard was and remains whether the plea represents a voluntary and intelligent choice among the alternative courses of action open to the defendant." 400 U.S. at 31. It went on to hold that

"An individual accused of crime may voluntarily, knowingly, and understandingly consent to the imposition of a prison sentence even if he is unwilling or unable to admit his participation in the acts constituting the crime. . . . when, as in the instant case, a defendant intelligently concludes that his interests require entry of a guilty plea and the record before the judge contains strong evidence of actual guilt. . . . When his plea is viewed in light of the evidence against him, which substantially negated his claim of innocence and which further provided a means by which the judge could test whether the plea was being intelligently entered, see McCarthy v. United States, supra, at 466-467 (1969),[10] its validity cannot be seriously questioned.

"[10] Because of the importance of protecting the innocent and of insuring that guilty pleas are a product of free and intelligent choice, various state and federal court decisions properly caution that pleas coupled with claims of innocence should not be accepted unless there is a factual basis for the plea . . . ." 400 U.S. at 37-38. (Emphasis supplied.)

New York cases conform to this federal standard. In People v. Serrano, 15 N.Y.2d 304 (1965), the defendant pleaded guilty to second-degree murder to satisfy an indictment for first-degree murder. At the hearing before the trial court accepted the guilty plea,

"although the defendant admitted shooting and killing [the victim], an essential element of the crime of murder in the second degree, namely, the intent to kill (Penal Law, § 1046), could not readily be inferred from the defendant's recitation of the circumstances of the killing." 15 N.Y.2d at 307.

The Court of Appeals held:

> "The conclusion seems inescapable . . . that, in light of the defendant's statement of the circumstances surrounding the homicide, the trial judge should not, in the first instance, have accepted his plea of guilty. It was, instead, his duty to refuse the plea and order the trial continued, or, more appropriately, to advise the defendant that his admissions did not necessarily establish guilt of the crime to which he was pleading and to question him further both with regard to his story of the crime and as to the possible disposition of his request to change his plea. . . . Of course, once so advised that his version of the crime is not consistent with the charge to which he is pleading, a defendant might still wish to plead guilty, perhaps to avoid the risk of conviction upon a trial of the more serious crime charged in the indictment, and such a plea could be accepted by the court. The fact remains, however, that, before accepting a plea of guilt where the defendant's story does not square with the crime to which he is pleading, the court should take all precautions to assure that the defendant is aware of what he is doing. Manifestly, no such cautionary effort was here made." 15 N.Y.2d at 309-310.

See also, e.g., People v. Shipman, 14 N.Y.2d 883 (1964) (abuse of discretion to deny motion to withdraw guilty plea which had been entered because of misstatement of elements of crime by state police); People v. Nixon, 21 N.Y.2d 338, 354 (1967) ("It is not tolerable for the State to punish its members over protestations of innocence if there be doubt as to their guilt, or if they be unaware of their rights, or if they have not had opportunity to make a voluntary and rational decision

with proper advice in pleading guilty."); People v. Beasley, 25 N.Y.2d 483, 487 (1969) (guilty plea should be vacated where "defendant's statement at sentencing is somewhat vague" but "may be interpreted to mean" that he did not admit "one of the basic elements of the crime").

Thus, the Due Process Clause, under the McCarthy-Alford-Serrano rule, requires that before accepting entry of a guilty plea, a judge must either

(1) draw forth on the record admissions by the accused as to each element of the crime with respect to which be proposes to plead guilty, or

(2) make clear to the accused that he has not admitted all elements of the crime and satisfy himself that the record, nonetheless, contains strong evidence of actual guilt. In the case at bar, neither procedure was followed.

It is apparently conceded by the State (Memorandum of Law In Opposition To Petitioner's Application for a Writ of Habeas Corpus, dated August 26, 1975, pp. 3, 12), and was found by the District Court (App. D, p. 12), that none of the requisites of subparagraphs 1 through 4 of Penal Law § 140.30 was ever established, neither at the hearing where the plea was accepted nor at the hearing on the motion to withdraw the guilty plea. Indeed, the record of the hearing at which the plea was

accepted (App. F, pp.8, 11, 14) demonstrates Harned's repeated insistence that he had never physically attacked anyone. As petitioner was the only witness at that hearing, there was nothing in the record from which the Court could have found "strong evidence of actual guilt." North Carolina v. Alford, supra, 400 U.S. at 38.

Moreover, Harned was misled by Judge Altimari's comment, "the fact that you didn't consummate the rape is of no consequence. I want to know whether or not you committed a burglary." (App. F, pp. 14-15.) The question of rape was of consequence to the charge of first-degree burglary, and was of great importance to Harned. To Harned, his admission of "burglary" was consistent with his insistence upon his innocence with respect to rape, or even attempt to rape. Judge Altimari, however, knew, or should have known, better. He misled Harned by inaccurately suggesting that physical injury was irrelevant to the charge of first-degree burglary, and Harned relied upon him.

Harned did not possess "an understanding of the law in relation to the facts." McCarthy v. United States, supra, 394 U.S. at 466. Indeed, he was given a definite misunderstanding of the law by the judge who accepted his guilty plea. Obviously, Harned did not "voluntarily, knowingly, and understandingly consent to the imposition of a prison sentence",

North Carolina v. Alford, supra, 400 U.S. at 37; he did not known and understand that which Judge Altimari misstated.

Judge Judd agreed that "the ritual required by the Serrano and McCarthy decisions was not complied with" (App. F, p. 16), but concluded that, "the failure to establish the element of physical injury is harmless error under the circumstances of this case" (App. F, p. 17). But no explanation was offered, or is readily apparent, for this clearly erroneous conclusion.

Petitioner steadfastly denied having committed, or even having attempted to commit, any physical attack. The only reasonable inference from the record of the plea hearing is that Harned would not have pleaded guilty to any crime he knew to involve physical injury. Judge Altimari misstated the law with respect to the elements of first-degree burlary and thereby misled Harned; as a result, Harned pleaded guilty, was sentenced to ten years imprisonment and has a permanent record as a violent criminal. This was not harmless error.

In United States ex rel. Morgan v. Henderson, 516 F.2d 897 (2d Cir.1975), cert. granted, 44 U.S.L.W. 3178 (10/6/75), this Court affirmed, without opinion, a ruling of a District Court vacating a guilty plea because of the trial court's failure to inform the accused that second-degree murder required proof of intent to cause the death of the victim. In the case at

bar, not only did not the trial court inform petitioner of the elements of first-degree burglary, it affirmatively misled him on this subject. Surely, then, the Morgan ruling requires reversal of the District Court here.

In short, at the time petitioner entered his guilty plea he was denied due process of law through both (1) the failure of the trial judge to establish, either through the accused's testimony or evidence offered by the State, the necessary elements of the crime, and (2) the misleading misstatement of the nature of the crime by the trial judge. Harned's guilty plea is therefore void, and the writ should have been issued by the District Court.

2. The totality of the circumstances surrounding appellant's guilty plea, including his unconstitutionally prolonged pre-trial incarceration, his parents' pressure upon him and his attorneys' abandonment of him, made it impossible for him to knowingly, understandingly and voluntarily plead guilty.

Nineteen months passed after Harned's first arrest without his being tried on those very serious charges, including over five months during which he was incarcerated. The State failed to try him despite his repeated requests for a trial on the first indictment, including four requests during the period of incarceration. (Petition for Writ of

Habeas Corpus, filed July 23, 1973, Appendix A, pp. 1-4.) Moreover, the State has never offered any excuse for the delay. Thus, under the standards of Barker v. Wingo, 407 U.S. 514, 530-533 (1972), Harned was denied his Sixth Amendment right to a speedy trial with respect to the first indictment.

The State argues that this unexplained, and unjustifiable, delay is irrelevant to the validity of Harned's plea to the second indictment. At most, the State asserts, the delay would justify quashing the first indictment, without disturbing the validity of the plea to the second indictment.

The State's argument ignores the fact that it tied the two indictments together to strengthen its hand in the plea bargaining it forced upon petitioner, over his objections. The State ignores the Assistant District Attorney's threats to extend further the pre-trial delay with respect to the earlier indictment by trying the indictments in reverse order. The State knew, and Harned knew and expressed clearly, that a conviction on the second indictment would be extremely prejudicial to his defense to the first indictment. Harned insistently proclaimed his innocence of the charges in the first indictment; indeed, the record of the felony examination on those charges shows the weakness of the State's case against him (App. E). The State used the combined pressure of the two indictments to extract a guilty plea from Harned.

Having thus tied the two indictments together, the State is now estopped to say that Harned's plea of guilty to one charge in the second indictment must be reviewed in a vacuum.

The State's denial of Harned's right to a speedy trial on the first indictment had an invidious effect upon his capacity to analyze rationally the plea bargain he was offered. He had suffered "oppressive pretrial incarceration"

> "The time spent in jail awaiting trial has a detrimental impact on the individual. It often means loss of a job; it disrupts family life; and it enforces idleness. Most jails offer little or no recreational or rehabilitative programs. The time spent in jail is simply dead time." Barker v. Wingo, supra, 407 U.S. at 532-533.

Other pressures supplemented those caused by Harned's unconstitutional pre-trial confinement. His parents were in the courtroom, his mother was hysterical, his father was dying, and they both urged him to plead guilty. His attorneys, who had already been paid over $5,000, were saying they could do no more for him. At this point Harned succumbed to the pressure and "agreed" to plead guilty to "burglar_". Significantly, as soon as he left the courtroom and was away from the pressure of his parents and lawyers, he regained his composure and immediately wrote to Judge Altimari requesting leave to withdraw his guilty plea and demanding, once again, trial on the first indictment.

This is not the behavior of one who has "voluntarily, knowingly, and understandingly consent[ed] to the imposition of a prison sentence". North Carolina v. Alford, supra, 400 U.S. at 37. Rather, it is the behavior of one who has been coerced and then relieved of the coercive constraints. Coercion produced Harned's guilty plea on June 23, 1971; that coercion makes the guilty plea void.

3. The trial court's refusal to allow appellant to withdraw his guilty plea, despite his immediate motion and the absence of any prejudice to the State, denied the accused his Sixth Amendment right to a trial.

Perhaps the most amazing aspect of this case, at most second only to Judge Altimari's misleading suggestion that personal injury is irrelevant to first-degree burglary, is that the trial judge even hesitated to grant Harned's motion to withdraw his plea. As stated in the leading treatise, the general rule in New York is that

> "If the defendant claims he is innocent of the crime charged, the court at least must inquire into the claim and, in the absence of prejudice to the People, should ordinarily grant the motion to withdraw the plea if defendant continues to assert his innocence." R. Pitler, New York Criminal Practice Under the CPL, § 9.12 at 456-457 (1972).

Judge Altimari gave the State an opportunity to claim that withdrawal of the plea would be prejudicial (App. H, pp. 42, 44-45); it never did so. There is nothing in the record to indicate why the ordinary procedure was not followed in this case.

There may be important policy reasons why those who plead guilty should not be allowed to retract their pleas at will. Such a general rule might cripple the criminal justice system. But on the facts here, there was no reason to refuse, and that refusal was, for constitutional reasons, beyond the discretion of the trial court. Appellant did not wait to see what sentence he would receive; he moved immediately. He did not use his plea to postpone his trial or otherwise prejudice the State; he entered the plea partially because he was not being tried promptly, as was his constitutional right.

An accused should not be allowed to waive lightly his constitutional right to a trial. This should mean that if he does waive it but immediately attempts to retract that waiver, he should be allowed to do so unless the State would be prejudiced by the retraction.

If on June 23, 1971, a door-to-door salesman had sold goods or services to Harned on an installment plan, he would have been allowed three days to cancel the contract. N.Y. Personal Property Law, § 425 et seq. (McKinney 1975 supp.). Instead, on June 23, 1971, Harned

"bargained" away up to fifteen years of his personal liberty, but his nearly immediate request to cancel the "agreement" was denied. Those who surrender only their property should hardly be treated more leniently and forgivingly than those who relinquish their personal freedom. Rather, this Court should declare that it was incumbent upon the trial court, by virtue of the Fifth, Sixth and Fourteenth Amendments, to grant Harned's request to withdraw his guilty plea.

CONCLUSION

For these reasons, petitioner respectfully submits that this Court should issue a writ directing the Nassau County Court to allow petitioner to withdraw his plea of guilty to indictment # 31363.

Dated: New York, New York
February 27, 1976

Respectfully submitted,

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